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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 60.

LOUIS BERRA,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

SUPPLEMENTAL BRIEF FOR PETITIONER.

STANLEY M. ROSENBLUM,
MARK M. HENNELLY,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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ARGUMENT.

Since this Court adjourned on June 6, 1955, without having acted on the above-captioned petition, there have been during the summer recess certain significant developments in connection with one of the questions presented which petitioner now calls to the Court's attention. The particular question involved is the third of those presented on pp. 2-3 of the original petition concerning the applicability to the instant case of **Commissioner v. Wilcox**, 307

U. S. 404, holding embezzled funds not to be taxable income. On June 2, 1955—the day on which petitioner's reply brief herein was filed—the United States Court of Appeals for the Second Circuit rendered in the case of **Estate of Jacob J. Dix v. Commissioner of Internal Revenue**, now reported at 223 F. 2d 436, a decision contrary to that rendered by the United States Court of Appeals for the Eighth Circuit in the instant case, now reported at 221 F. 2d 590. The **Dix** case had been argued and submitted on April 21, 1955—the day before the Eighth Circuit's decision in the instant case on April 22, 1955. Petitioner's case decided by the United States Court of Appeals for the Eighth Circuit was thus not mentioned in the **Dix** briefs; otherwise, it is felt the apparent conflict between the two would have been considered in the later opinion of the Second Circuit. Of particular importance to the consideration of this petition is that the government has now petitioned this Court for certiorari to review the very issue involved (i. e., the applicability and vitality of the **Wilcox** case) in No. 363, October Term, 1955. In view of the government's position taken on behalf of the Commissioner of Internal Revenue in its own petition for certiorari (see pp. 11-15, No. 363), that the question is of substantial importance in the administration of the revenue laws and one which is constantly perplexing the lower courts, petitioner submits that it would best serve the interests of justice to grant certiorari in both cases and to have them argued and submitted simultaneously so that the **Wilcox-Rutkin** conflict can be clearly and explicitly defined for the guidance of the lower courts, the government, and taxpayers alike.

In brief, the question of the taxability of misappropriated funds arose in the **Dix** case, as in the instant case, because the taxpayer utilized his authorized power to draw on corporate bank accounts by diverting funds to his own personal use. Some of the diverted funds were withdrawn from the corporate bank account solely on the signature

of the taxpayer Jacob Dix; others were withdrawn by checks signed by the taxpayer and his son or by his son alone, who was another corporate employee, see Findings of Fact in 12 T. C. M. 536. In answer to the taxpayer's reliance on the **Wilcox** case in the Tax Court, Judge Van Fossan held the **Wilcox** case inapplicable and the **Rutkin** case to be controlling because the taxpayer had acquired the funds by fraud and deceit; on this basis and limiting the **Wilcox** case strictly to its facts, the Tax Court ruled the misappropriated funds were properly includible in income. The reversal of the Tax Court's ruling by the United States Court of Appeals in the **Dix** case is important, and the conflict between the **Dix** case and the instant case is readily seen when it is recalled that it was on the basis of petitioner's so-called fraud and deceit that the United States Court of Appeals for the Eighth Circuit distinguished **Wilcox** in the instant case and ruled adversely to petitioner. The position taken by the court in the instant case is in accord with the dissent expressed by Judge Hincks of the Second Circuit in the **Dix** case, 223 F. 2d 438, and the Tax Court opinion of Judge Van Fossan. It is noteworthy, also, that Judge Hincks regards the **Rutkin** case as having overruled **Wilcox**; while, on the other hand, the majority of the **Dix** court saw the case as one of embezzlement with the vitality of **Wilcox** still in effect.

Necessary to the decision of the Second Circuit in the **Dix** case that the funds were embezzled by the taxpayer's unauthorized withdrawals was the acceptance of the principle so strongly urged and rejected by the two courts below in the instant case; namely, that the right of an employee to draw on his employer's funds on deposit in a bank constitutes possession thereof so that a subsequent misappropriation gives rise to the crime of embezzlement. Here, too, the cases are in conflict. Subsidiary to this issue is the **Dix** court's failure to find that the son's signature on certain of the checks representing the misappropriated

funds, either alone or with the taxpayer's, removes the requisite possession. In both such respects, the **Dix** opinion refutes the distinctions between the instant case and **Wilcox** suggested at p. 7 of the Memorandum for the United States filed herein.

The reasons stated in the government's petition for certiorari in **Commissioner of Internal Revenue v. Estate of Jacob J. Dix**, No. 363, October Term, 1955, with respect to the need for this Court's review of the **Wilcox-Rutkin** problem are compelling; in substance, they bear out the grounds previously stated in the instant petition and represent a change from the government's position as set forth in Memorandum for the United States filed herein, pp. 6-8. Whereas the government originally argued in its Memorandum in opposition that the **Wilcox** case was not applicable because the crime was not embezzlement, it states in the **Dix** petition as a reason for granting certiorari that it is important to settle the question because prosecutions have been authorized where the disputed income apparently came from embezzlements or closely analogous crimes. It points out the conflict between the **Dix** case and **Kann v. Commissioner**, 210 F. 2d 247, and infers the better rule is to be found in the latter case, where the Third Circuit held that it was not material to determine whether the taxpayers were technically guilty of embezzlement under local law. Whereas the government here argued that funds in a corporate bank account subject to an employee's withdrawal are not in his possession, it takes no issue with such a holding in the **Dix** case. Whereas the government originally had no difficulty in drawing from the **Rutkin** case "the proper test of whether unlawful gains constitute income" (p. 7, Memorandum for the United States), it now concedes that there has been brought into "sharp focus the difficulty of attempting to reconcile **Wilcox** and **Rutkin**" (p. 11, Petition, No. 363). Whereas the government originally cited as categorical authority for the denial of

the instant petition the cases of **Rollinger v. United States**, 208 F. 2d 109 (C. A. 8th), **Briggs v. United States**, 214 F. 2d 699 (C. A. 4th), and **Marienfeld v. United States**, 214 F. 2d 632 (C. A. 8th), it now tells us that these cases have made evident the "well-founded uncertainties" of the lower courts as to the status of **Wilcox**. Petitioner suggests that the list of cases cited in the government's petition in the **Dix** case (p. 14, No. 363) as typical of these uncertainties is incomplete with the inadvertent omission of **Berra v. United States**, 221 F. 2d 590; in view of its conflict with the **Dix** opinion both in spirit and principle it amply supports the government's thesis expressed therein.

CONCLUSION.

The government has already announced that it does not oppose certiorari on one question herein presented. Another question presents a direct conflict between Courts of Appeals. Since this Court's recess in June, 1955, the government itself has recognized the important nature of the embezzlement issue and in a separate petition to review a judgment of the Second Circuit has requested certiorari for substantially the same reasons set forth in the instant petition. This case and the **Dix** case, No. 363, present convenient vehicles for this Court to lay down some readily understood principles defining the limits and meaning of the **Wilcox** and **Rutkin** cases, if those cases are to continue as controlling. On the one hand, this case offers the simple situation of a trusted employee who with the aid of a confederate misappropriates his corporate employer's funds; on the other hand, the **Dix** case offers the more complex situation of an employee who misappropriates his corporate employer's funds when the employee is at all times a major recipient of the corporation's dividends. The latter situation may raise serious questions as to whether or not the misappropriated funds constitute constructive dividends to the wrongdoer and, therefore, income. Yet each

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SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

case presents an important facet of the basic inquiry as to how misappropriated funds shall be taxed. Considered together, the opinions to be written would complement each other and present a total answer. It is submitted that certiorari should be granted on all issues in the instant case; and in the manner of the recent "net-worth" cases argument should be held and this case considered together with **Commissioner of Internal Revenue v. Estate of Jacob J. Dix**, No. 363, October Term, 1955, if this Court should grant certiorari in the latter case.

Respectfully submitted,

STANLEY M. ROSENBLUM,
MARK M. HENNELLY,
Counsel for Petitioner.